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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-756

BERNARD SCREEN PRINTING CORPORATION,

Petitioner,

against

UNIVERSAL TERMINAL & STEVEDORING CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MARTIN B. MULROY,
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No. ·

BERNARD SCREEN PRINTING CORPORATION,

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UNIVERSAL TERMINAL & STEVEDORING CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Bernard Screen Printing Corporation prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Second Circuit, denying rehearing on its judgment entered July 14, 1972, affirming the judgment of the United States District Court for the Southern District of New York in favor of the petitioner, but granting respondent-stevedore the benefit of a bill of lading provision limiting its liability to $500 when said stevedore negligently damaged petitioner's cargo.

Jurisdiction

The decision of the United States Court of Appeals for the Second Circuit is dated July 14, 1972. A timely petition to the Court of Appeals for rehearing was denied by an order entered herein on August 24, 1972. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

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Question Presented

Does the United States Carriage of Goods by Sea Act which governs the relations between shipper and carrier, and provides, 46 U.S.C.A. Sec. 1302, that the carrier's rights are those stated in Sections 1303 and 1304 but which does not state any right to extend the carrier's limitations to others, nevertheless permit a carrier to make available its limitations by bill of lading stipulation to all agents and independent contractors.

Statement of the Case

The petitioner seeks to recover damages to one case of machinery which on November 29, 1966 was negligently dropped by the respondent-stevedore during discharge operations from on board the SS HAVLOM. The stevedore was acting pursuant to a contract by which it was engaged by the ocean carrier defendant. The facts are not controverted.

The bill of lading relied upon by the stevedore states that its terms:

> "shall govern the relations, whatever they may be, between the shipper, consignee and the Carrier, Master and ship in every contingency. . . ."

Although this clause does not refer to the respondent-stevedore the bill of lading goes on to provide in Clause 1(J) that if any agent or independent contractor engaged by a shipowner is under any responsibility to the consignee:

> "all defenses (including all limitations of and exonerations from liability) provided to said shipowner or demise charterer by law or by the terms hereof shall be available. . . ."

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The District Court, relying on *Carle & Montanari* v. *American Export Isbrandtsen Lines, Inc. and John W. McGrath Corporation,* 275 F. Supp. 76, affd 386 F.2d 839, cert. den. 390 U.S. 1013, 88 S. Ct. 1263 stated that the limitation of liability claimed by the respondent is permitted by Section 1304(5) of the United States Carriage of Goods by Sea Act (46 U.S.C. Section 1300 et seq.).

The Court of Appeals affirmed the judgment of the District Court, claiming it was "bound" by the *Carle & Montanari* decision although petitioner argued that the court considering *Carle & Montaniari* was not apprised of "THE ESSO BELGIUM" decision and did not contemplate the Supreme Court's admonitions against such bill of lading expansion of the rights limited by Congress, nor the limitation of the carriers rights by the statute itself.

Reasons for Granting the Petition for a Writ of Certiorari

Bernard Screen Printing Corporation seeks certiorari in this case in the belief that where the United States Congress properly exercised its legislative function in limiting the contractual rights of interests affecting the common good, and the Supreme Court has addressed itself to such limitation it is not for lesser courts to expand those rights to the detriment of the very interests the statute was intended to protect.

The lack of authority in a shipowner to invade a cargo owner's rights against third persons was asserted in *United States* v. *Atlantic Mutual Insurance Company, et al.* (*"the Esso Belgium"*), 343 U.S. 236, 72 S. Ct. 666 in which Mr. Justice Black said:

> "Here, once more, 'we think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests' of the

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> varied groups who would be affected by permitting carriers to deviate from the controlling rule that without congressional authority they cannot stipulate against their own negligence or that of their agents or servants. If that rule is to be changed, the Congress, not the shipowners, should change it."

See also *United States* v. *Farr Sugar Corp., et al.*, 191 F 2d 370, 374. These cases were not brought to the attention of the Court in *Carle & Montanari* because authority was not in issue.

In *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, La. 1959, 79 S. Ct. 1210, 360 U.S. 411, the Supreme Court granted a writ of certiorari sought by petitioner in a case much like this matter on the refusal of the Court of Appeals to strike down, as a matter of law, an exculpatory clause in a tariff which was contrary to a prior decision of the Supreme Court.

The Second Circuit in the decision appealed from similarly asserted conflicting reasoning from the rule of this Court footnoted at 360 U.S. 421:

> "9. Congress has in some instances declared by statute the circumstances under which carriers may contract for release from or limitation of liability, or rules governing the liability of carriers irrespective of contract. See 46 U.S.C.A. Sections 181-196, 1300-1315 (water carriers); 49 U.S.C. Sections 20(11), 319 (rail and motor carriers). Where such statutes apply of course no agreement in derogation of them, even if embodied in a tariff, is valid. See, e.g., Adams Express Co. v. Croninger, 226 U.S. 491, 33 S. Ct. 148, 57 L.Ed. 314; Boston & Maine R. R. v. Piper, supra. * * *"

The Second Circuit in this case shockingly followed what it held in *Carle & Montanari* even after it was

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pointed out that the *Carle & Montanari* panel did not have before it the argument made here. That argument is that a carrier, whose rights are stated to be enumerated in the United States Carriage of Goods by Sea Act, has no other rights. This Court expressly denied the carrier could extend those enumerated rights in *The Esso Belgium, supra.* Possibly the Court of Appeals was influenced by this Court's denial of certiorari in *Carle & Montanari* which as stated did not involve the exercise of legislative power or affect the entire area of regulating interest affecting the public.

It is axiomatic that the construction of a statute that is clearly stated—without ambiguity—must be a strict construction to give effect to the intent of the legislature. That the Congress meant by Sections 1303 and 1304 that the carrier has these rights and no others is evidenced by Sections 1306 and 1307 setting forth those instances where a carrier can stipulate with complete freedom, i.e., before loading, after discharge and in shipments not in the ordinary course of trade.

The Carriage of Goods by Sea Act was enacted to protect cargo owners as a group, *Standard Electrica, S.A.* v. *Hamburg Sudamerikanische Damfschifffahrts-Gesell-Schaft,* 375 F. 2d 943, in contracting with ocean carriers who practically immunized themselves from liability (and hence responsibility) by bill of lading provisions in derogation of common law principles. The effect was to harmonize the varying forms of bills of lading in use by prescribing the carrier's rights, duties, etc. springing from the bill of lading, long recognized as a contract of adhesion, *Encyclopaedia Britannica, Inc.* v. *SS Hong Kong Producer,* 422 F. 2d 7.

Robert C. Herd & Co. v. *Krawill Machinery Co.* (1959), 359 U.S. 297, 79 S.Ct. 766, with emphasis supplied where applicable said of the Carriage of Goods by Sea Act, 46

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U.S.C. § 1300 *et seq.* at 359 U.S. 301:

> The Act is clearly phrased. *It defines the term "carrier" to include "the owner or the charterer who enters into a contract of carriage with the shipper."* § 1301(a). It imposes particularized duties and obligations upon, and grants stated immunities to, the "carrier." §§ 1302, 1303, 1304. Respecting limitation of the amount of liability for loss of or damage to goods, it says that "neither the carrier nor the ship" shall be liable for more than $500 per package. § 1304 (5). *It makes no reference whatever to stevedores or agents.* The legislative history of the Act shows that it was lifted almost bodily from the Hague Rules of 1921, as amended by the Brussels Convention of 1924, 51 Stat. 233. The effort of those Rules was to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade. Ibid. *Those Rules do not advert to stevedores or agents of a carrier.* The debates and Committee Reports in the Senate and the House upon the bill that became the Carriage of Goods by Sea Act likewise do not mention stevedores or agents. There is, thus, nothing in the language, the legislative history or environment of the Act that expressly or impliedly indicates any intention of Congress to regulate stevedores or other agents of a carrier, or to limit the amount of their liability for damages caused by their negligence. It must be assumed that Congress knew that generally agents are liable for all damages caused by their negligence. Yet Congress, while limiting the amount of liability of "the carrier (and) the ship", did not even refer to stevedores or agents of a carrier. *"We can only conclude that if Congress had intended to make such an inroad on the rights of claimants (against negligent agents) it would have said so in unambiguous terms" and "in the absence of a clear Congressional*

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policy to that end, we cannot go so far." Brady v. *Roosevelt S.S. Co.*, 317 U.S. 575, 581, 584, 63 S.Ct. 425, 428, 429, 430, 87 L.Ed. 471.

Accordingly this Court is respectfully petitioned to correct the impression that where, as here, a stipulation in the bill of lading that is *ultra vires* the carrier by the Act will be given effect nonetheless so as to limit a stevedore's liability.

CONCLUSION

It is respectfully submitted that the foregoing considerations warrant allowance of the writ sought by petitioner.

Respectfully submitted,

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MARTIN B. MULROY,
Of Counsel

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OPINION OF DISTRICT COURT

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

67 Civ. 4487

BERNARD SCREEN PRINTING CORPORATION,

Plaintiff,

against

MEYER LINE and UNIVERSAL TERMINAL & STEVEDORING CORPORATION,

Defendants.

NEWMAN, J.

The facts are not controverted.

Plaintiff, owner of screen printing machinery transported from Hamburg to New York aboard defendant Meyer Line's vessel S. S. Havlom, sues to recover damages to one case of the machinery, which was negligently dropped and damaged by employees of the stevedore defendant Universal upon discharge of the vessel in New York on November 29, 1966. Pursuant to stipulation, action against Meyer Line (the ocean carrier) has been discontinued by all parties.

The sole question to be decided is whether the bill of lading, under which the shipment was forwarded, effectively limits the liability of Universal to $500 as distinguished from the claimed damages of $14,545. By separate contract with the carrier, Universal had agreed to stevedore the vessel, and to perform other services.

The bill of lading, clause 1(J), contains the following language concerning the limitation of liability permitted by Section 1304(5), U. S. Carriage of Goods by Sea Act, 46

U.S.C. § 1300 et seq.:

> 1.(J) The contract evidenced hereby is between the shipper and the owner or demise charterer of the ship designated to carry the goods. It is understood and agreed that, other than said shipowner or demise charterer, no person, firm or corporation or other legal entity whatsoever (*including the master, officer and crew of the vessel and all agents and independent contractors*) is, or shall be deemed to be, liable to the shipper or consignee as carrier, bailee or otherwise howsoever in contract or in tort. If, however, it shall be adjudged that any other than said shipowner or demise charterer is carrier or bailee of the goods or under any responsibility to the shipper or consignee, all defences (including all limitations of said exonerations from liability) provided to said shipowner or demise charterer by law or by terms hereof shall be available to such other . . . (emphasis added)

Resolution of the issue depends upon whether the above-quoted language meets the standards promulgated in the decided cases regarding the extension of limitation of liability clauses in bills of lading to third parties. Specifically, it must be determined whether the words "agents and independent contractors" are sufficient to include defendant Universal, which was engaged to do the stevedoring work upon discharge of the vessel.

The reported cases throw some light upon the path to be pursued in deciding the question. No Federal court decision has construed the precise provisions involved herein.* In *Carle & Montanari, Inc.* v. *American Export*

---

* The Court, in *Middle East Export Co.* v. *Concordia Line*, 65 Misc. 2d 270 (Civil Court, New York County); 1971 AMC 64, found that the identical provision included an independent stevedoring contractor.

Isbrandtsen Lines, Inc., 275 F. Supp. 76, 78 (S.D.N.Y.), aff'd 386 F. 2d 839 (2d Cir. 1967), cert. denied sub nom. *Carle & Montanari, Inc.* v. *John W. McGrath Corp.*, 390 U.S. 1013 (1968), the limitation of liability provision was extended to a stevedore where the bill of lading used the language "all agents and all stevedores".

Plaintiff relies heavily on the recent holding in *Cabot Corp.* v. *S.S. Normacscan*, —— F.2d —— (2d Cir. March 26, 1971); unfortunately for plaintiff, however, such reliance on *Cabot Corp.* is misplaced. There, the Court of Appeals interpreted language in a bill of lading limiting liability to "all persons rendering services in connection with performance of this contract." The Court reiterated the necessity for construing limitation of liability clauses strictly, citing *Robert C. Herd & Co. Inc.* v. *Krawill Machinery Corp.*, 359 U.S. 297, 305 (1959), and stated that the intention of the parties must be expressed in "clarity of language".

In refusing to extend the limitation of liability provision to the stevedore, the Court nevertheless noted that there was doubt as to "whether (the language) 'all persons rendering service' is designed to include stevedores loading the goods for another shipper". And significantly, in *Cabot Corp.* the stevedore was loading steel plates belonging to another shipper when it caused damage to the plaintiff's property, and was not engaged in performance of the contract, i.e., the bill of lading in issue.

The requirement of "clarity of language" serves a salutary purpose so that limitations of liability may not rest upon vague and ambiguous terms. But this does not mean that language, which is unequivocal, should be ignored merely because it fails to catalog the various particulars which form a definite, expressed entity. Language in a contract should be construed in its context and with an eye to the function to be accomplished.

Clarity is not synonymous with specificity. In *Carle & Montanari*, the bill of lading referred to "all agents and all stevedores". The substitution of the words "independent contractors" for "stevedores" in a contract drawn by persons engaged in the shipping industry was intended to have some significance. To exclude "stevedores", who are independent contractors, from the scope of the more inclusive term would, in effect, be holding that parties by using the more inclusive term had accomplished the opposite result.

Such a construction would not comport with the purpose underlying the doctrine of strict construction of limitation of liability clauses. We are not dealing with a term in the bill of lading which is unknown to the law. In Restatement (Second), Agency § 2(3) (1958) the term "independent contractor" is defined as "a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent". (See *Consolidated Housecraft, Inc.* v. *United States*, 170 F. Supp. 842 (E.D.N.Y. 1959); *United States* v. *Olympic Provision & Baking Co.*, 282 F. Supp. 819 (S.D.N.Y. 1968), aff'd 393 U.S. 480 (1969); and see also *Scruttons, Ltd.* v. *Midland Silicones, Ltd.*, A.C. 446 (1962), 1 All. E.R.1, (1961), where the stevedore was referred to as an independent contractor.

In using the words "independent contractors" in the instant bill of lading, sufficient guidelines were expressed to indicate the intention of the parties. It was unnecessary to list specifically all possible constituent elements of that term, which would include all the contractors who rendered service for the carrier in connection with the shipment. Where a class of persons such as "independent contractors" is referred to in a contract, it is clear that the

class includes all those reasonably falling within the definition of that class and within the context of the transaction. No further degree of particularity is necessary to give the term clarity.

As indicated, *Carle & Montanari* recognized the power of the carrier to contract with the shipper in a bill of lading to extend to a stevedore the limitation of liability of $500 per package allowed to the carrier. I conclude that such power was effectively exercised when the bill of lading herein used the language "agents and independent contractors" to designate those intended to come within the ambit of the limitation provision; and that there was no necessity for further specification to bring the stevedore within the scope of the term "independent contractor".

Accordingly, the limitation of liability clause in the bill of lading referring to "independent contractors" was sufficiently clear to encompass the stevedore, and Universal's liability is therefore limited to $500.

It is so ordered.

Dated: New York, New York, June 15, 1971.

BERNARD NEWMAN,
United States Customs Court Judge,
Designated to sit as
United States District Judge.

OPINION OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 265—September Term, 1971.

(Argued December 1, 1971 Decided July 14, 1972.)

Docket No. 71-1764

BERNARD SCREEN PRINTING CORPORATION,

Plaintiff-Appellant,

—v—

MEYER LINE,

Defendant,

and

UNIVERSAL TERMINAL & STEVEDORING CORPORATION,

Defendant-Appellee.

Before:

LUMBARD, WATERMAN and FEINBERG,

Circuit Judges.

Appellant, Owner-shipper of cargo, seeks recovery for damages cargo suffered through negligence of appellee stevedore when cargo was discharged, and appeals from the order of the trial court, United States District Court for the Southern District of New York, Newman, *J.*,* 328 F.Supp. 288 (1971), holding that appellant was bound

* Of the United States Customs Court, sitting by designation.

by the terms of the bill of lading which limited recovery to only $500.

Affirmed.

MARTIN B. MULROY, PETER W. FLANAGAN, THOMAS D. TOY, Hill, Rivkins, Warburton, McGowan & Carey, New York City, *for Plaintiff-Appellant.*

JAMES M. LEONARD, ALBERT S. COMMETTE, Brown, Quencer & Commette, New York City, *for Defendant-Appellee.*

PER CURIAM:

We affirm the judgment order entered below limiting the liability of defendant-appellee (Universal), the negligent stevedore, to $500.00. Reference is had to the lower court opinion, reported at 328 F.Supp. 288 (SDNY 1971) for exposition of the uncontroverted and conceded facts.

The provisions of Meyer Line's bill of lading, totally drafted by it, include clause 1(J):

> 1(J) The contract evidenced hereby is between the shipper and the owner or demise charterer of the ship designated to carry the goods. It is understood and agreed that, other than said shipowner or demise charterer, *no person, firm or corporation or other legal entity whatsoever (including the master, officer and crew of the vessel and all agents and independent contractors) is, or shall be deemed to be, liable to the shipper or consignee as carrier, bailee or otherwise howsoever in contract or in tort.* If, however, it shall be adjudged that any other than said shipowner or demise charterer is carrier or bailee of the goods or under any responsibility to the shipper or consignee,

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all defences (including all limitations of said exonerations from liability) provided to said shipowner or demise charterer by law or by terms hereof shall be available to such other . . . . (Emphasis supplied).

This provision gives to all "legal entities" reasonably comprehended within its language, and, specifically to "independent contractors" such as the stevedore here, the benefit which the carrier and the ship have under COGSA to limit liability to a maximum of $500 per unit "for any loss or damage to or in connection with the transportation of goods" unless the goods are shipped pursuant to a specific declaration of nature or value, under an adjusted rate. 46 U.S.C. §1304(5).

Obviously such a clause as 1(J), which limits by contract one's recourse to the courts to pursue common law rights of action, must be looked at with distrust; and, inasmuch as the clause is drawn by the carrier and the shipper is, for all practical purposes, completely in the carrier's power, the clause, obviously, should be strictly construed against the carrier and any person benefitted thereby.[1] However, in *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359

1 In *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, *infra*, the Court, at 305, stated:

> Similarly, contracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries, for they "are not to be applied to alter familiar rules visiting liability upon a tortfeasor for the consequences of his negligence, unless the clarity of the language used expresses such to be the understanding of the contracting parties." *Boston Metals Co.* v. *The Winding Gulf*, 349 U.S. 122, 123-124, 75 S.Ct. 649, 650, 99 L.Ed. 933 (concurring opinion).

Appellant contends that the Meyer Line bill of lading lacks the required "clarity of the language used." However, we agree with the court below that Universal, which independently contracted by separate contract with Meyer Line to discharge cargo from the *S.S. Havlom*, was indeed an "independent contractor," and hence comprehended within the language used in clause 1(J).

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U.S. 297 (1959), the Supreme Court, while unanimously denying to a negligent stevedore the classification of a "carrier" under 46 U.S.C. §1301(a), unanimously stated:

> Looking to the limitation-of-liability provisions of the bill of lading, we see that they, like §1304(5) of the Act and its legislative history, do not advert to stevedores or agents. Instead they deal only with the "Carrier's liability" to the shippers. They say that "the Carrier's liability, if any, shall be determined on the basis of $500 per package." There is, thus, nothing in those provisions to indicate that the contracting parties intended to limit the liability of stevedores or other agents of the carrier for damages caused by their negligence. If such had been a purpose of the contracting parties it must be presumed that they would in some way have expressed it in the contract. Since they did not do so, it follows that the provisions of the bill of lading did "not cut off [respondent's] remedy against the agent that did the wrongful act." Sloan Shipyards Corporation v. United States Shipping Board Emergency Fleet Corporation, 258 U.S. 549, 568, 42 S.Ct. 386, 388, 66 L.Ed. 762.
>
> We therefore conclude that there is nothing in the provisions, legislative history and environment of the Act, or in the limitation-of-liability provisions of the bill of lading, to indicate any intention, of Congress by the Act, *or of the contracting parties by the bill of lading, to limit the liability of negligent agents of the carrier.* (Emphasis supplied). Id. at 302-303.

This language has prompted a belief that a cargo-carrier and a cargo-owner may contractually extend to a stevedore the benefit enjoyed by carriers under COGSA's $500 limitation on damages, and we consider ourselves bound by a

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previous decision of this court permitting parties to do precisely that. In language unmistakably clear, Judge Bonsal, relying upon *Herd*, held in *Carle & Montanari, Inc. v. American Export Isbrandtsen Line*, 275 F.Supp. 76 (SD NY 1967), that a negligent stevedore was entitled to the benefit of the $500 limitation of liability when the applicable bill of lading contained language set forth in the margin.[2] This court affirmed, 386 F.2d 839 (2 Cir. 1967) "on the opinion of Judge Bonsal" and the Supreme Court denied certiorari, 390 U.S. 1013 (1968).

Affirmed.

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2 In *Carle & Montanari* v. *American Export Isbrandtsen Lines* the carrier's bill of lading read:

> 1. (a) . . . The terms of this bill of lading constitute the contract of carriage, which is between the Shipper, Consignee and owner of the goods, and the owner or demise charterer of the vessel designated to carry the goods. It is understood and agreed that, other than said shipowner or demise charterer, no person, firm or corporation or other legal entity whatsoever (including the Master, officers and crew of the vessel, *all agents and all stevedores and other independent contractors whatsoever*) is, or shall be deemed to be liable with respect to the goods as carrier, bailee or otherwise howsoever, in contract or in tort. If, however, it shall be adjudged that any other than said shipowner or demise charterer is carrier or bailee of the goods or under any responsibility with respect thereto, all limitations of and exonerations from liability provided by law or by the terms hereof shall be available to such other. In contracting for the foregoing exemptions, limitations and exonerations from liability, the Carrier is acting as agent and trustee for the other above mentioned. (Emphasis supplied). 275 F.Supp. 76, 77-78.

Appellant seeks to avoid our holding in that case by pointing out that the language "and all stevedores and other independent contractors" is contained in that bill of lading, whereas in the bill of lading before us only the phrase "independent contractors" is used. We agree with the lower court's disposition of this contention, 328 F.Supp. at 290. Here it is clear that the inclusive term "independent contractors" includes Universal.

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Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of July one thousand nine hundred and seventy-two.

Present: HON. J. EDWARD LUMBARD,
HON. STERRY R. WATERMAN,
HON. WILFRED FEINBERG,
Circuit Judges.

BERNARD SCREEN PRINTING CORPORATION,
Plaintiff-Appellant,

v.

MEYER LINE and UNIVERSAL TERMINAL & STEVEDORING CORPORATION,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

Order Denying Petition for Rehearing.

71-1764

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

BERNARD SCREEN PRINTING CORPORATION,

Plaintiff-Appellant,

v.

MEYER LINE and UNIVERSAL TERMINAL & STEVEDORING CORPORATION,

Defendants-Appellees.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

J. EDWARD LUMBARD
J. Edward Lumbard (SRW)

STERRY R. WATERMAN
Sterry R. Waterman

WILFRED FEINBERG
Wilfred Feinberg (SRW)

August 24, 1972.

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MICHAEL RODAK, JR., CLERK

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

BERNARD SCREEN PRINTING CORPORATION,

Petitioner,

—against—

UNIVERSAL TERMINAL & STEVEDORING CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Carriage of Goods by Sea Act (46 U.S.C. Sec. 1304(2)):

Sec. 4(2) 3,4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

BERNARD SCREEN PRINTING CORPORATION,

Petitioner,

—against—

UNIVERSAL TERMINAL & STEVEDORING CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement

This action sought to recover for damages for a case of machinery damaged on November 29, 1966, as it was being discharged from the SS HAVLOM. The negligence of the Respondent, who was performing stevedoring operations, is conceded and has never been an issue.

The sole question below involved the applicability and validity of certain terms in the bill of lading governing the shipment of the goods. These terms are set forth in the Petition and purport to extend the benefits of certain contractual limitations of liability to Respondent.

As noted in the petition both the District Court and the Court of Appeals for the Second Circuit held that the limitation of liability provisions were valid as applied to Respondent and, accordingly, directed that Respondent's liability be limited to $500.00.

The Facts

To the extent that the facts may be relevant and significant, they will be found set forth in the opinion of the District Court (Judge Newman) at page A1 through A5 of Petitioner's appendix.

Pertinent specific language of the bill of lading is to be found in the opinion of Judge Newman at page A2 and in the opinion of the Court of Appeals for the Second Circuit at pages A8-A9.

ARGUMENT

Petitioner seeks a Writ of Certiorari to the United States Court of Appeals for the Second Circuit on the asserted ground that the courts below erred in failing to recognize an expression of Congressional Intent debarring carriers from inserting in bills of lading provisions of the type here involved. It is further urged that the courts below failed to heed a holding of the court (*United States* v. *Atlantic Mutual Insurance Co., et al.* (343 U. S. 236), which holding, it is claimed by Petitioner, should have precluded the result reached below (reported at 328 F. Supp. 288 and affirmed 464 F. 2d 934).

The action of the Circuit Court, in rejecting the very argument now made, is described as "shocking" (Petitioner's Brief, p. 4).

Respondent, on its part, submits that the decision of the United States Court of Appeals for the Second Circuit (and, indeed, the various other courts which have uniformly reached similar results) (1) violates no Congressional "mandate", (2) fully accords with the law as enunciated by this Court, and (3) is in conformity with both industrial practice, the basic equities of the situation and the uniform weight of lower court decisional law.

Though Petitioner's Brief contains citation of some eight decisions, in reality it relies on one—and only one—decision of this court, that in *United States* v. *Atlantic Mutual Insurance Co.* (the Esso BELGIUM), cited supra.

Characterizing the bill of lading provision which extended the benefits of the "package limitation"* to the stevedore as an invasion of cargo owners' rights against third persons, Petitioner urges that "invasions" of this sort are interdicted by the rationale of the "Esso BELGIUM." A close look at the issues determined by that decision is, therefore, warranted.

Shipowner in the Esso BELGIUM was protected against direct liability to its own cargo by both § 3 of the Harter Act (46 U.S.C. § 192) and § 4(2) of the Carriage of

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* The "package limitation" stipulates to a maximum value of $500 per "package . . . or customary freight unit" *General Motors Corp. v. Moore-McCormack Lines, Inc.*, 2 Cir., 1971, 451 F. 2d 24. By accepting this limited value, the cargo owner receives the benefit of a lower freight rate. If he chooses, the cargo owner may declare the full value of the goods, but then he must pay the full value freight rate.

Goods by Sea Act (46 U.S.C. § 1304(2)), when that liability arises out of a negligence in the "navigation or in the management of the ship." Nothing in either Act, however, precluded cargo from suing the other vessel in a mutual fault (or "Both-to-Blame") two ship collision and recovering from the non-carrying ship the whole of its damage. Of course, the non-carrying vessel would, in a judicially-determined mutual fault case, promptly recover from the cargo-carrying vessel, as part of its collision damages, one-half of the monies paid to cargo. Thus, the cargo-carrying vessel, in a "Both-to-Blame" situation, would indirectly be forced to bear one-half of a loss which, had it been solely at fault, it would not have had to pay at all.

In an effort to obtain relief from this situation, carriers then began to insert "Both-to-Blame" clauses in their bills of lading. These clauses required cargo to indemnify the cargo-carrying vessel where the shipowner was forced to pay another vessel one-half of cargo's damages in a mutual-fault collision.

Mr. Justice Black, speaking for a majority of this Court, held the exculpatory clause invalid, citing an unbroken line of authority to the effect that "common carriers cannot stipulate for immunity from their own or their agents' negligence" (343 U. S. at p. 236). The decision carefully notes that a broad construction of the statute would appear to permit a carrier to do just that. Bearing in mind the policy considerations previously expressed often and uniformly by this court, public policy demanded the holding arrived at there.

Respondent fully subscribes to the principle that a contract of adhesion which exempts carriers "or their agents" from negligence is presumptively against public policy.

In the Esso Belgium, cargo had no options. It could not recover the whole of its collision damages no mat-

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ter what it did. It could exercise no choice to pay a higher freight rate and obtain relief from the onerous effect of the exculpatory clause.

The case at bar, however, presents a far different picture. Here, Petitioner, *had it chosen to spend the money*, could have declared a valuation of goods in excess of $500.00—indeed up to whatever valuation Petitioner might assert the goods truly had.*

As long ago as 1913, cargo interests attempted to persuade this court that an optional valuation clause (i.e. a stipulated limitation on the amount recovered unless a higher freight rate were paid) constituted an invalid release from liability for negligence.

This view was unequivocally rejected by this court in *Kansas City Southern Ry. Co.* v. *Carl*, 227 U.S. 639, 650:

> "Is the contract here involved one for exemption from liability for negligence and therefore forbidden? . . . A declared value by the shipper for the purpose of determining the applicable rate, when the rates are based upon valuation, is not an exemp-

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* The process was described by the Court in *General Motors Corporation* v. *Moore-McCormack Lines, Inc.*, 2 Cir., 1971, 451 F. 2d 24, 26:

> "The decision to limit the carrier's liability to $500 is also in accord with one guiding policy behind the Carriage of Goods by Sea Act—to limit liability of common carriers for damage to cargo where the value of the cargo is not known to the carrier. If a shipper wishes to avoid this $500 limit, he may declare a higher value, thus alerting the carrier of its potential liability and allowing it to charge extra freight, if appropriate. This option was open to GM; by declaring the value of the generators, it would have made Moore-McCormack an insurer up to that value. Having failed to do so, it cannot now complain of the limitation on recovery."

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> tion from any part of its statutory or common-law liability. The right of the carrier to base rates upon value has been always regarded as just and reasonable. The principle that the compensation should bear a reasonable relation to the risk and responsibility assumed is the settled rule of the common law."*

The depiction of cargo owners as a class (Cf. Petition, p. 5) victimized by overbearing shipowners does not withstand the equal light of economic reality. The usual reason a shipper fails to declare a correct valuation—and thus pay an appropriately higher freight rate—is that he does not choose to do so, having insured the goods elsewhere. As Chief Judge Friendly observed in *Nichimen Company* v. *M/V Farland*, 2 Cir., 1972, 462 F.2d 319, 335:

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* This Court pointed out that the principle involved was one of estoppel—since the shipowner had availed itself of a lower freight rate by accepting a limited valuation on the goods, it should not later be heard to complain that the goods were, in fact, worth more. See also, *Hart* v. *Pennsylvania Railroad*, 112 U. S. 331, 340-343.

In *Ansaldo San Giorgio I* v. *Rheinstrom Brothers Co.*, 294 U. S. 494, this Court explained:

> ". . . Such a stipulation, we have said, is not enforcible unless the shipper, for agreeing to such a limitation of the carrier's liability, receives a consideration consisting in the offer of a lower rate as against a higher rate offered for the service without such limitation; or, as has been said, the rate is tied to the release. Agreements of this kind are held to be reasonable and not offensive to the public policy against contracts relieving the carrier from its own negligence. *The agreement as to value, in consideration of carriage at the lower rate thus obtained, is held to estop the shipper from demanding damages in excess of the agreed value.*" [Emphasis supplied.] 294 U. S. 496, 497

> "If Nichimen wanted coverage over $500 per coil, it could either use the statutory alternative of declaring a higher value or cover itself by insurance. Most cargo damage cases are really battles between insurers, See *Leather's Best, Inc.* v. *SS Mormaclynx*, supra, 451 F.2d at 815, and there is no need for shedding crocodile tears on behalf of the shipper or consignee."

Petitioner is conveniently myopic as to the significance of the fact that this Court rendered its decision in *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 in 1959, some seven years *after* the decision in the *Esso Belgium* case (1952). It must be a source of surprise to this Court that Petitioner contends that the Supreme Court had foreclosed itself in 1952 from what it clearly said was licit in 1959.

In actuality, cargo owners have continuously sought to persuade the courts that optional valuation clauses contravened public policy. Contrary to what Petitioner now says, the attempt was expressly made in *Carle & Montanari Inc.* v. *American Export Isbrandtsen Lines, Inc.*, D.C. S.D.N.Y., 1967, 275 F.Supp. 76 aff'd 368 F.2d 839, cert. den'd 390 U.S. 1013. The District Court pointed out (275 F.Supp. at p. 79), that a clause limiting the valuation of a package was not a release from liability provision against public policy. The position taken by the District Court was affirmed by the Second Circuit (386 F.2d 839) and certiorari was later denied by this Court (390 U.S. 1013). Since this Court has clearly indicated in *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 1959, 359 U.S. 297, that the parties to a bill of lading might, if they so choose, extend the benefits of the package limitation to the

stevedore,* other courts have failed to experience the difficulties now urged by Petitioner.

Thus, in *Secrest* v. *SS Tiber,* 5 Cir., 1971, 450 F.2d 285, the Fifth Circuit reached the same result as did the Second Circuit in construing the extension to stevedore of the same optional valuation clause. In *Sommer Corporation* v. *United Fruit Company* v. *Panama Canal Company,* D.C. Canal Zone, 1972, 335 F.Supp. 412, the District Court, in holding that a limited liability clause (the package limitation) might validly be extended to a stevedore, pointed out (at p. 415) that he extension of the package limitation to stevedore was a universal practice of long standing.

In performing its services a stevedore is doing that which the shipowner is obligated to do under the bill of lading. Stevedore is intimately bound up with the whole process of maritime commerce. The Courts have consistently indicated that if a cargo owner wishes to obtain the right to pursue a lawsuit for full value against either the shipowner or the stevedore (where the stevedore has been described in the bill of lading as a beneficiary), the cargo owner must declare the proper value and pay an adjusted

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* "With regard to petitioner's first contention, we look first . . . and next to the limiting provisions of the bill of lading, to determine whether . . . the shipper and the carrier by the bill of lading, evidenced any intention to limit the liability of negligent agents of a carrier." 359 U. S. at p. 301

"There is, true, nothing in those provisions to indicate that the contracting parties intended to limit the liability of stevedores or other agents of the carrier for damages caused by their negligence. If such had been a purpose of the contracting parties it must be presumed that they would in some way have expressed it in the contract." 359 U. S. at p. 302

freight rate.* Having failed to do so, cargo owner should have no ground for complaint.

Nothing in either decisional or statutory law is to the contrary.

The Petition should be denied.

CONCLUSION

The Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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* In *Cabot* v. *S.S. Mormacsean*, 2 Cir., 1971, 441 F. 2d 476, the Court, though finding against a stevedore, nonetheless clearly held that the parties might validly extend the package limitation to stevedores. See also, *Dorsid Trading Company* v. *S.S. Fletero*, D. C. S. D. Tex., 1972, 342 F. Supp. 1, 6; *Toyomenka, Inc.* v. *Toko Kaiun Kabushika Kaiska*, D. C. S. D. Tex., 1972, 342 F. Supp. 292.